No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. GREENWAY ALBERT and MAJA GREENWAY ALBERT, husband and wife,

Appellants,

vs.

IRA B. JORALEMON,

Appellee.

REPLY BRIEF OF APPELLANTS.

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The following abbreviations are used throughout:

"Op. Br." for opening brief of appellants; "Ans. Br." for brief of appellee; "Tr." for printed record.

In order to answer the brief of appellee, the designation therein of the parties as they appeared in the court below, the appellee Joralemon being the plaintiff and the appellants Albert and his wife being the defendants, is adopted for this reply brief.

Statement of the Case.

Defendants take exception to plaintiff's statement of additional facts (Ans. Br. 1-3) as follows:

1. Plaintiff states (Ans. Br. 1) that dealings between him and defendants "were on somewhat of an informal basis," as evidenced by the first-name salutation in two letters [Tr. 134, 138] and the extension of greetings to Mrs. Albert [Tr. 138]. In determining the degree of formality of the dealings at issue, these amenities must be weighed against the fact that the lease and option to purchase [Tr. 116-129] was executed only after execution of two preliminary agreements [Tr. 109-115], and extended negotiations between attorneys for the parties. See testimony of Robert E. Driscoll, Jr., of Lead, South Dakota, attorney for plaintiff [Tr. 167, 168], who traveled to Tucson, Arizona, for preliminary negotiations with defendants' attorneys [Tr. 168], prepared a proposed agreement [Tr. 183, 184] and the lease and option to purchase as executed [Tr. 189, 190].

2. The proposition that this Court can take judicial notice of the value of the mining claims covered by the lease and option is not supported by law, including the authority cited by plaintiff (Ans. Br. 2).

3. Plaintiff's statement that he "surrendered the lease and option, by his letter of November 5, 1956" (Ans. Br. 2) is a legal conclusion contrary to the trial Court's Conclusions of Law II and IV [Tr. 61] that the first quarterly payment and quitclaim deed were conditions precedent to the exercise by the plaintiff of his option to terminate.

It is submitted further that the other additional facts stated by plaintiff are not material to the questions involved in defendants' Specifications of Errors (Op. Br. 7).

ARGUMENT.

Summary.

Plaintiff has divided the Argument in his answering brief into three sections. The first two purport to answer defendants' opening brief. These sections fail to accomplish their purpose because of plaintiff's failure to recognize the distinction between waiver and estoppel made by the Supreme Court of Arizona in the cases of *The Equitable Life Assurance Society v. Pettid,* 40 Ariz. 239, 11 P. 2d 833, and *Waugh v. Lennard,* 69 Ariz. 214, 211 P. 2d 806, cited and quoted by defendants (Op. Br. 9, 10).

Reply to Plaintiff's Argument That the Pleadings and Other Proceedings in the Case Are Sufficient to Sustain the Affirmative Defense of Waiver and Estoppel.

Plaintiff's reluctance to distinguish between the defenses of waiver and estoppel, and failure to face up to the true issues presented by defendants' opening brief is evident from the caption and opening sentences of the first section of plaintiff's argument. Plaintiff's tendency to use the terms wiaver and estoppel interchangeably is reflected in the caption (Ans. Br. 3). Plaintiff and defendants agree that the Supreme Court of Arizona has defined waiver "as a voluntary and intentional relinquishment of a known right" (Ans. Br. 9; Op. Br. 10). Paragraphs 8 and 9 of plaintiff's complaint, which plaintiff argues contain facts sufficient upon which to base the defense of waiver (Ans. Br. 3), fail to allege any facts constituting a voluntary and intentional relinquishment of a known right. The portion of the opening statement of plaintiff's counsel which plaintiff cites (Ans. Br. 4) as stating facts upon which to base a waiver and estoppel

[Tr. 96] fails to allege any facts meeting the test supplied by the Arizona Court's definition of waiver. Plaintiff calls "particular attention" to the use by one of his counsel of the word "waiver" in discussing certain testimony that was offered (Ans. Br. 4), and well he might. It is the only place that the word appears in the pleadings or the transcript of proceedings at pre-trial conference or trial. However, the word is used in conjunction with estoppel; the next sentence quoted in plaintiff's brief shows that his counsel was talking only about estoppel and is further evidence of plaintiff's mistaken tendency to consider the two as identical. In this context, the utterance by plaintiff's counsel of the word "waiver" cannot be held to have given defendants adequate notice that the issue of waiver was to be tried.

Plaintiff cites and quotes Rule 15(b) of Federal Rules of Civil Procedure and emphasizes the provision that failure to amend does not affect the result of the trial of issues not raised by the pleadings. He then contends that the question of waiver was litigated (Ans. Br. 6). The best evidence that the question was not litigated, and that the defense of waiver had not even occurred to plaintiff long after the trial, is the Findings of Fact and Conclusions of Law proposed by plaintiff [Tr. 34-42] and filed more than three months after the trial [Tr. 42]. Plaintiff proposed no findings of fact amounting to waiver and no conclusions of law on the issue, yet argues now that the matter was litigated.

Plaintiff's complaint does not plead facts amounting to waiver, and there was no trial of the issue.

Reply to Plaintiff's Argument That the Evidence Was Sufficient to Sustain the Court's Findings and Conclusion Establishing Waiver.

The second section of plaintiff's argument consists primarily of unsupported conclusions. Plaintiff's statement that "there was ample evidence of an intent in (*sic*) the part of the defendants to waive the provisions of the contract requiring payment of all sums due from plaintiff to defendants and the tender of a quitclaim deed before termination of the contract" (Ans. Br. 7) is followed by a list of facts casting no light whatsoever on dedendants' intent. Plaintiff argues that the statement by defendant Albert to his attorney that he did not want to demand a quitclaim deed, made one week afer being assured by plaintiff that the deed would be sent as soon as practicable [Tr. 134], alone is sufficient evidence of an intentional relinquishment of defendants' right to demand the deed (Ans. Br. 8). Standing alone, the fact that defendant Albert at that time did not want to demand a quitclaim deed is no evidence of an intentional relinquishment of such a right. His immediate concern was the favorable settlement of a dispute over the remittance made by plaintiff a week earlier, and he had been assured that the deed would be forthcoming. Certainly a demand for the deed, in the face of this assurance, would have hindered negotiations concerning the disputed remittance. The attorney to whom the statement was made did not construe it as evidencing any intention to relinquish the defendants' right to receive the quitclaim deed. On the contrary, he informed defendant Albert three months later that Albert could not do any business with other people interested in the property because his lease was still in effect until he received the quitclaim deed [Tr. 210].

Plaintiff's unsupported conclusion that "it was obvious to the trial court that defendants had no need for the deed" and that "a quitclaim deed would have been of no use whatever to them" (Ans. Br. 8) is refuted by the above, and the existence of the provision requiring the execution, acknowledgment, and delivery of such a deed in the lease and option [Tr. 119].

Defendants did not base the argument in their opening brief on the absence of consideration for the alleged waiver, as suggested by plaintiff (Ans. Br. 8). Defendants' argument on the lack of evidence of waiver is completely in harmony with the definition expressed in *Waugh v. Lennard, supra,* and quoted by plaintiff (Ans. Br. 9).

Plaintiff has introduced and attempted to apply to the present case an equitable principle quoted from the case of *Onekama Realty Co. v. Carothers,* 59 Ariz. 416, 129 P. 2d 918 (Ans. Br. 9). The quotation begins:

> "The rule above stated is obviously based on the equitable principle . . ."

Plaintiff neglected to quote the "rule above stated" from the *Onekama* case, *supra.* The rule referred to is

> "that a vendor who has accepted payments after they are due cannot thereafter insist upon strict performance of the contract unless and until he notifies the vendee of such intent and gives a reasonable time for the vendee to bring his payments up to date."

Neither the rule nor the principle has application to the present case.

The second section of plaintiff's argument fails to establish a sufficiency of evidence to sustain the trial court's finding and conclusion of waiver.

Reply to Plaintiff's Argument of Additional Reasons for Sustaining the Judgment of the Lower Court.

Plaintiff argues that in any event the judgment should be affirmed by either applying the doctrine of equitable estoppel, or by holding that neither the payment of the first quarterly payment nor the delivery of a quitclaim deed was a condition precedent to the right of termination, contrary to the trial court's Findings of Fact III, XV and XVI [Tr. 56, 60].

Plaintiff acknowledges the rule that "findings of fact shall not be set aside unless clearly erroneous" (Ans. Br. 7).

In the case of *Evans v. Mason,* 82 Ariz. 40, 308 P. 2d 245, the Supreme Court of Arizona states:

> "An essential element of equitable estoppel is that the adverse party must have relied upon the conduct."

Plaintiff argues that the quitclaim deed was not delivered "because defendants by their conduct had done everything to induce the plaintiff and his agent and representative to believe that no deed was or would be required" (Ans. Br. 11) and "that plaintiff relied upon the silence of defendants is undisputed" (Ans. Br. 13). The argument is refuted by plaintiff's own testimony in the trial court (Op. Br. 14, 15). Plaintiff knew that the deed was required, and asked that it be taken care of by John W. Hamilton, secretary of Homestake Mining Company, whose oversight occasioned the failure to deliver the deed.

The lease and option itself [Tr. 119], and the testimony of plaintiff [Tr. 156-157] and his attorney [Tr. 194] are ample evidence in support of the trial court's Finding of Fact III [Tr. 56] and conclusion that the payment of the first quarterly payment and the delivery of the quitclaim deed were conditions precedent to the right of termination.

Conclusion.

Plaintiff, by arguing that allegations of estoppel are sufficient to raise the question of waiver, and by ignoring the necessity of evidence of intention to relinquish a right before there can be any finding of waiver of such right, has not made it necessary to bolster the position taken by defendants in the Conclusion of the Opening Brief of Appellants. That position is reasserted by reference herein.

Respectfully submitted,

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McCARTY, CHANDLER & UDALL,
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Attorneys for Appellants.